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Supreme Court of the United States

No. 651 **October Term, 1938**

FRANK HAGUE, individually and as Mayor of Jersey City, DANIEL J. CASEY, individually and as Director of Public Safety of Jersey City, HARRY WALSH, individually and as Chief of Police of Jersey City, and THE BOARD OF COMMISSIONERS OF JERSEY CITY,

Defendants-Petitioners,

vs.

COMMITTEE FOR INDUSTRIAL ORGANIZATION, STEEL WORKERS ORGANIZING COMMITTEE OF THE COMMITTEE FOR INDUSTRIAL ORGANIZATION, UNITED ELECTRICAL RADIO AND MACHINE WORKERS OF AMERICA, UNITED RUBBER WORKERS OF AMERICA, WILLIAM J. CARNEY, WILLIAM J. TRAYNOR, WILLIAM P. McGINN, SAMUEL MACRI, JAMES P. SWEENEY, DANIEL J. FOLEY and AMERICAN CIVIL LIBERTIES UNION,

Plaintiffs-Respondents.

BRIEF OF THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION, AS FRIENDS OF THE COURT.

THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION,

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BRIEF OF THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION, AS FRIENDS OF THE COURT.

Preliminary Statement.

The Committee on the Bill of Rights, of the American Bar Association, was created under authority of a resolution of the House of Delegates of the Association, adopted on July 29, 1938. The Committee's membership is as stated below (see Note).

NOTE: Douglas Arant (Alabama), Zechariah Chafee, Jr. (Rhode Island), Grenville Clark, Chairman (New York), Osmer C. Fitts (Vermont), Lloyd K. Garrison (Wisconsin), George I. Haight (Illinois), Monte M. Lemann (Louisiana), Ross L. Malone, Jr. (New Mexico), Burton W. Musser (Utah), John Francis Neylan (California), Joseph A. Padway (Wisconsin), and Charles P. Taft (Ohio).

The general function of the Committee is to defend the fundamental rights and immunities of the citizen, secured by the Bill of Rights. The Committee is authorized (with the approval of the President of the American Bar Association) to take appropriate action in cases deemed to involve substantial violations of such rights and immunities where the case involves issues of such a character as to call for presentation from an impartial standpoint and with special reference to the interest of the public at large in the principles involved. Believing that this case presents issues of this nature, the Committee (with the authority of the President of the Association) filed a brief as friends of the Court in the Court of Appeals for the Third Circuit. The Committee also voted to ask leave to file a similar brief in this Court if the Court should grant a writ of certiorari. The writ of certiorari was granted on February 6, 1939. This brief is filed with the approval of the President of the Association and with the written consent of counsel for the parties.

The Committee has no interest in this litigation save as its outcome will affect the integrity of the fundamental rights that are here in question, and particularly the right of assembly. The Committee will confine its discussion to the question of public assembly. We do not minimize the importance of safeguarding the right of free access against arbitrary and illegal "deportations" or the right of communication through distribution of circulars and the use of placards (covered by paragraphs A, 1, 2 and 3, and B, 1, 2 and 3 of the decree). However, the decision of the Circuit Court of Appeals was unanimous on these matters and we cannot think that the provisions of the decree in these respects involve questions on which the law is un-

settled. With respect, however, to the limits of free assembly in streets and parks, there has been uncertainty and conflict in the decisions and this Court has yet to speak definitively on that subject.

The Committee's Position.

The Committee believes that the course of conduct of the officials of Jersey City, as revealed by this record, constitutes a serious abridgement of the constitutional right "peaceably to assemble" of so deliberate and important a character as to be of national consequence.

We believe this to be true because of the findings of fact of the District Court, which have been confirmed by the Circuit Court. These findings of fact include findings that the plaintiff labor organizations and the American Civil Liberties Union are lawfully organized for lawful purposes that are within "the letter and spirit of our Constitution and laws and of the theory of our democratic institutions"; that the "defendants in their official capacities have adopted and enforced the deliberate policy of forbidding the plaintiffs and persons acting in sympathy or in concert with them, from communicating their views to the citizens of Jersey City through the holding of meetings or assemblies in the open air and at public places"; that various of the plaintiffs applied pursuant to the ordinance of Jersey City for permits to hold outdoor assemblies in public places in Jersey City but that the applications were denied; that there is no proof that the parks of Jersey City are "dedicated for purposes other than the general recreation of the public"; that Jersey City has granted permits to "various persons other than the plaintiffs"

desiring to speak at meetings in the Jersey City streets; that enforcement of the policies of the Jersey City officials as against the plaintiffs "results in irreparable damage to them"; and that there is no competent proof that the plaintiffs C. I. O. and American Civil Liberties Union "have so conducted themselves as to forfeit the protection of a court of equity." See Findings of Fact B, 4; E, 1, 2, 3, 7; F, 2, 3. (IV R. 129, 132-133, 134.)

We predicate our argument, in so far as it assumes facts, upon these findings of fact.

We shall submit to the Court the following considerations:

First, that the integrity of the right "peaceably to assemble" is an essential element of the American democratic system.

Second, that the protection of the right of assembly provided by the decree is in harmony with the modern doctrine of this Court which gives a wide scope to the constitutional guarantees of freedom of speech and assembly.

Third, that whether or not the ordinance in question is constitutional *on its face*, it has been *administered* in an unconstitutional manner; that threats and alleged apprehension of disorder of the sort appearing in this case do not justify the refusal of permits to hold meetings; that on the contrary it is the duty of public authorities to provide adequate police protection to prevent threatened disorder.

Fourth, that if the constitutional rights of assembly and free speech are to be effectively protected, a city cannot be permitted to close both its parks and its streets to public meetings but must in some manner make provision for such meetings at reasonable

times and places on public property. Here we shall advance the thought that the availability of a city's streets for public meetings should not be treated separately from the availability of its parks, but that they should be regarded as parts of a single problem, viz., the safeguarding of free speech and assembly in a manner consistent with the rights of the public to use their streets and parks for other purposes. Under this head we shall point out that the case of *Davis* v. *Massachusetts*, 167 U. S. 43, relied on by the defendants, is distinguishable on its facts, and furthermore that its doctrine is inconsistent with the maintenance of a vitally important medium of public discussion.*

It is the Committee's position that the right of assembly is one of the most vital elements of our system of government and that the right to hold open-air meetings in cities forms an important part of this right of assembly. It is the interference with that basic attribute of American citizenship that has convinced this Committee that there is here involved a far-reaching question, the decision of which will be of vital importance in respect of the maintenance of American civil rights.

We are confirmed in this conclusion by the very fact that the refusal of the permits for the meetings was clearly on the ground that the persons desiring to speak were unpopular in Jersey City and that the sentiments they might utter would be unpopular. In the Committee's view, this condition *emphasizes the importance of the issue.*

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* Having in mind that the findings and decree refer to "plaintiffs" and "defendants," we refer throughout to the plaintiffs-respondents as "the plaintiffs" and to the defendants-petitioners as "the defendants."

For if it should ever come about that the law countenances the suppression of free speech on the basis of the inacceptability to the prevailing majority opinion of the speakers or their sentiments, the very basis of the doctrines on which our institutions are built would be destroyed.

Our general position is well expressed by the words of a British statesman at the time of the disturbances in London in 1936 caused by the meetings and parades of the Fascist organization of Oswald Mosley:

> "Democracy does not mean that the side we approve of is at liberty to do what it pleases, while the side we do not approve of must be dealt with by repressive measures. Neither does it mean that upon a threat to break up a meeting the authorities should automatically prohibit the meeting; if so, there would be an end of free speech and no unpopular cause would ever gain a hearing."*

For the confirmation and preservation of the constitutional rights of free speech and assembly, we shall submit that this Court should go at least so far as to sustain the decree of the District Court with regard to public meetings.

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* Sir John Simon, Home Secretary, in the London *Times*, October 8, 1936.

ARGUMENT.

I.

Freedom of assembly is an essential element of the American democratic system.

At the root of this case lies the question of the *value* in American life of the citizen's right to meet face to face with others for the discussion of their ideas and problems —religious, political, economic or social.

Public debate and discussion take many forms including the spoken and the printed word, the radio and the screen. But, as we later point out in detail, assemblies face to face perform a function of vital significance in the American system, and are no less important at the present time for the education of the public and the formation of opinion than they have been in our past history.

The right of assembly, we affirm, lies at the foundation of our system of government. The cornerstone of that system is that government—all government, whether federal, state or local—shall be based on the consent of the governed.[1] But "the consent of the governed" implies not only that the consent shall be uncoerced but also that it

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[1] "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; * * *." (The Declaration of Independence.) In his debate with Douglas at Urbana, Illinois on October 24, 1854, Lincoln said, "No man is good enough to govern another man without that other's consent." See Emanuel Hertz, *Abraham Lincoln, A New Portrait* (Liveright, 1931), p. 645.

shall be grounded on adequate information and discussion. Otherwise the consent would be illusory and a sham.

No truth has been more strongly enforced by the history of recent years than that the suppression of discussion leads directly to tyranny and the loss of all other civil rights. On the other hand experience proves the necessity of a *constant process of open debate* if a free and democratic government is to function effectively.[2] Only in this way can public opinion take shape in legislation that will command the general support which will make it law in a real sense. Only so, also, can government on its administrative side be kept reasonably free from abuses. Only through free discussion, in short, can democracy function at all.

These are old truths but they need constantly to be remembered and applied.

There is a special aspect of free expression here present. The effort in this case was to suppress only *some* communications and *some* meetings. As above mentioned it is plain that the suppression was on the basis that the speakers and their probable utterances would be unpopular. And as already stated it is this very feature that gives a special importance to this case. What may be popular today may be unpopular tomorrow; and no principle could be more destructive of American free speech than to judge the permissibility of a public meeting by any standard of its popularity. The right to express unpopular opinions and to hold unpopular meetings is of the essence of American liberty. This is so not only for reasons of principle

[2] "Satisfactory public opinion in a crisis is impossible unless both sides can present their contentions in meetings and through the press." (Chafee, *The Inquiring Mind*, (Harcourt, Brace & Co., 1928) p. 166.)

but for practical reasons of government. If criticism, however severe and unpopular, of majority beliefs were suppressed nothing is more certain than that the American system could not long survive.

This consideration has often been emphasized by far-sighted men. One hundred years ago Edward Beecher (a brother of Harriet Beecher Stowe) said:

> "We are more especially called upon to maintain the principles of free discussion in cases of unpopular sentiments or persons, as in no other case will any effort to maintain them be needed."[3]

A lawyers' committee, of which the present Chief Justice was a member while at the bar in 1920, said:

> "Hyde Park meetings and Soap Box oratory constitute the most efficient safety-valve against resort by the discontented to physical force."[4]

In *De Jonge* v. *Oregon*, 299 U. S. 353 (1937), the Chief Justice wrote:

> "Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. * * *
>
> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights

[3] Pamphlet on the "Alton Riots", published at Alton, Illinois, by G. Holton in 1838.

[4] Brief of Special Committee of the Association of the Bar of the City of New York in opposition to the expulsion of the Socialist Assemblymen from the New York Legislature, dated January 20, 1920, p. 41. The members of the Committee were Charles E. Hughes, Morgan J. O'Brien, Louis Marshall, Joseph M. Proskauer, and Ogden L. Mills.

themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. * * *

"* * * The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." (pp. 364-365.)

These are the general principles that we stress in this case. The defendant officials seem to have forgotten or ignored them. They advance pleas of the unpopularity of the defendants, of objections by certain citizens of Jersey City to their sentiments and to their being heard at all. But they seem to forget that those who would suppress or abridge free speech and assembly have a heavy burden of justification and that the kind of excuses they advance must be weighed against the great consideration of preserving an underlying value of American life that is specifically secured by our fundamental law.

When all is said the preservation of free speech and assembly depends on ascribing a high *relative value* to these rights. It has recently been well said that there is

only one way to safeguard open discussion, "that is, to place so high a valuation on freedom of expression in all its forms as never to practice or permit any interference with it."[5]

At the outset we wish to stress the soundness of this approach. We place a "high valuation" on freedom of expression. We believe that freedom of assembly—a vital aspect of free expression—should be upheld against intolerant and arbitrary action. It is because we hold this general point of view that we have asked leave to file this brief.

II.

The protection of freedom of assembly provided by the decree is in accord with the modern doctrine of this Court in its interpretation of the constitutional guarantees of freedom of speech and of assembly.

The whole recent trend of decision by this Court is to afford solid protection to the rights of free speech and assembly.

Freedom of the press and of speech and assembly are *expressly* protected by the First Amendment of the Constitution of the United States against *federal* interference. But it has required judicial interpretation to make it plain that these types of freedom are also protected by the Constitution against restrictions on the part of state and municipal governments. This principle is now, however, thoroughly established.

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[5] Edward P. Cheyney, "Freedom and Restraint: A Short History", in *Annals of the American Academy of Political and Social Science*, November, 1938.

The First Amendment provides: "Congress shall make no law * * abridging the freedom of speech * * or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Fourteenth Amendment provides: "* * * nor shall any State deprive any person of * * liberty * * without due process of law." In a series of cases, of which one of the first was *Gitlow* v. *New York*, 268 U. S. 652 (1925), the Court has held that "liberty" in the Fourteenth Amendment includes the various types of liberty of expression which are guaranteed by the First Amendment. This means, as the Court has held, that neither state governments nor city governments, which are agencies of the State, can arbitrarily or unreasonably restrict freedom of speech or freedom of assembly.

The decision which specifically referred to freedom of assembly is *De Jonge* v. *Oregon, supra,* decided in 1937. In this case, the Court held that a person cannot constitutionally be convicted of crime merely for assisting in the conduct of a meeting held under the auspices of the Communist Party. De Jonge had been convicted in a state court for speaking at a meeting called by the Communist Party to protest against police methods during a strike. The meeting was open to the public and the audience consisted largely of non-members of the Communist Party. Nothing illegal was said or done at the meeting by De Jonge or anybody else, and no unlawful literature was distributed there. However, the jury was allowed to consider Communist literature distributed at other times and places, and to convict De Jonge on the ground that the Communist Party had unlawfully advocated violent doctrines. As the Chief Justice said (299 U. S. at p. 362):

> "His sole offense as charged, and for which he was convicted and sentenced to imprisonment for seven years, was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party."

The Court set aside the conviction because it violated the constitutional right of freedom of assembly. The principle for which the decision stands is that a speaker cannot properly be convicted on the sole charge that he participates in a meeting *held under particular auspices;* punishment can constitutionally be based only on what is said or done at the meeting itself.

This is the only recent decision of the Court squarely on the question of free assembly. But there are other decisions upholding the principle that expression must not be arbitrarily suppressed. Among the forms of interference with liberty of discussion which have been held void by the Court since the *Gitlow* case are statutes imposing criminal penalties for writings and speeches not clearly dangerous, sweeping injunctions against newspapers, license taxes on newspapers, and ordinances requiring permits for the distribution of circulars on public streets. *Fiske* v. *Kansas,* 274 U. S. 380 (1927); *Stromberg* v. *California,* 283 U. S. 359 (1931); *Near* v. *Minnesota,* 283 U. S. 697 (1931); *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936); *Herndon* v. *Lowry,* 301 U. S. 242 (1937); *Lovell* v. *Griffin,* 303 U. S. 444 (1938).

Although none of the recent cases which establish the modern doctrine of the Court deals specifically with the subject of interference with freedom of assembly *through the denial of permits for outdoor meetings,* nevertheless

the denial by this method of the right of assembly is closely analogous to the suppression of unpopular meetings by criminal prosecutions, which was held invalid in the *De Jonge* case. The condemnation of such suppression is also within the principle of other decisions above cited, for the suppression of public meetings through denial of permits does not differ fundamentally from the efforts to impair free expression in other forms, that have been condemned by this Court in the cases cited immediately above.

These decisions cannot be read without a realization that the Court has recently announced doctrines that go a long way to safeguard rights of the sort here involved.

III.

Whether or not the ordinance is unconstitutional on its face, such threats and alleged apprehension of disorder as appear in this case do not justify refusal of a permit. The ordinance has been unconstitutionally administered in that the defendant officials adopted a standard under which permits were denied because of threatened disorder without reference to the possibility of controlling such disorder.

The defendants seek to justify their repeated denials of permits to the plaintiffs on the ground not only that they disapproved of the plaintiffs and of their sentiments, but also on the ground that certain persons and organizations of Jersey City threatened disorder if the meetings were held. In the view of our Committee this is a crucial feature of the case because it involves a question that is vital to the maintenance of free speech and assembly, viz., whether

threatened disorder, not on the part of those desiring to speak but on the part of their opponents, constitutes a valid excuse for refusing to permit a public meeting for lawful purposes.

In affirming the decree of the District Court (and enlarging it in respect of the streets) the Circuit Court set forth two distinct lines of reasoning: *First*, that the ordinance under which the defendants purported to act is unconstitutional *on its face*, and *second*, that even if the ordinance be considered valid on its face, it has been unconstitutionally administered. The Circuit Court made it clear that these reasons were deemed independent, and that the second reason by itself was sufficient to support the decision.

A principal ground upon which, as we believe, the ordinance was void in its administration is that the officials of Jersey City acted upon the theory that threats of disorder, irrespective of the controllability of the threatened disorder, furnished a valid excuse for the denial of the permits. As already mentioned, the defendants also adopted another wrong standard of administration in that they considered themselves justified in discriminating against the plaintiffs because they did not like them and disapproved their aims and beliefs. The use of each of these erroneous standards was, we believe, equally fatal to the constitutionality of the ordinance in its administration. However, it seems that the public has more clearly grasped the invalidity of the plea that the plaintiffs were unpopular than of the plea that the suppression of the meetings was justifiable to preserve public order. Since, in our view, these two pleas are equally specious and equally dangerous to freedom of assembly we wish under this head to stress the question of the threats of disorder.

(1.) *In denying permits on the theory that threatened disorder, irrespective of its controllability, justifies such denial, the defendant officials have administered the ordinance in an unconstitutional manner.* To hold otherwise would establish a precedent whereby, as a practical matter, free speech through open-air meetings might be suppressed in every city of the country. Such a result would be a blow to constitutional liberties in a vital spot.

In making this statement we do not minimize the importance of the maintenance of public order and of reasonable public tranquillity. We recognize that the right of free assembly, like freedom of speech or even religious liberty, has some limitations in the interests of public decency and order. In this case, however, it is unnecessary to speculate as to theoretical conditions which might conceivably make it impossible to provide adequate police protection. No such extreme state of facts is shown here. No facts appear to support any claim of powerlessness of the police; no evidence whatever of police helplessness was adduced. The defendants adopted a theory or standard under which the refusal of the permits was justified because of the mere threat of disorder without reference to its controllability by police action. The essential point is that, in administering the ordinance, the defendant officials were acting upon a standard which was erroneous in the sense that its application operated to suppress the plaintiffs' rights of free speech and assembly.

In this state of the case, the action of the defendant officials must be dealt with as though the ordinance itself prescribed in terms the standard which they adopted in enforcing it. Since *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), this Court has recognized that a statute or ordi-

nance enacted for the guidance of official action must be dealt with, for constitutional purposes, as though it incorporated the rule by which the officials have in fact administered it. Constitutional attacks upon the administration of a statute fair on its face have usually been based upon charges of discrimination in violation of the equal protection clause; but the principle underlying such cases is also clearly applicable where, as here, the administrative standard results in the deprivation, without due process of law, of the liberty to assemble.

In this matter of public meetings, a process of mutual adjustment, of give-and-take, is required on both sides. Public order and the protection of property are precious but freedom of discussion is precious also. If the latter is to be preserved some danger of disorder must be faced for the sake of the constitutional right of free assembly. It is natural that threats of trouble should often accompany meetings on controversial questions. But it is not consistent with American principles to suppress the meetings on that account. The practice under ordinary conditions in our large cities is for the authorities to arrange with the applicants to put the meeting in a suitable place, and have enough policemen on hand to quell apprehended disturbances.[6]

The requirement that a permit must be applied for on reasonable notice gives the city authorities the opportunity

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[6] See the enlightening observations by a former Police Commissioner of New York City during disturbances:

Arthur Woods, *Policeman and Public* (Yale University Press, 1919), pp. 73-78; his text is abstracted in Chafee, *Freedom of Speech* (Harcourt, Brace and Howe, 1920), pp. 177-178, and *The Inquiring Mind* (Harcourt, Brace & Co., 1928), pp. 151-152.

to ascertain the danger of disturbances and then to provide a sufficient police force to meet any such danger. Moreover, this procedure makes it possible, if permits are sought for several meetings on the same day, for each to be assigned an appropriate place. All this would be in accordance with the give-and-take principle of our constitutional system; but no such course was followed here.

We have thus far considered the threat of disorder without regard to its source. There is, however, a special circumstance in this case: The findings indicate no tendency to disorder on the part of the speakers at the forbidden meeting (see Findings of Fact, paragraph E, 4, 5, 6, IV R. 113) or that their *supporters* at such meetings would promote disorder. At most, it appears that *opponents* of the speakers had threatened to break up the meetings; and there is no evidence that these threats could not have been successfully resisted if the city officials had desired to provide adequate police protection. In short, no evidence appears of any *bona fide* intention or effort to protect the meetings applied for; and no evidence appears that Jersey City would have been unable to afford adequate police protection if its officials had had the will to do so.

On this state of facts the real question at issue is whether *any* threat of disorder, even though only by opponents of the speakers, excuses the suppression of open-air meetings through the denial of permits.

We submit that if it should be so held, the constitutional right of free assembly would to a large extent have become a mockery. Such a doctrine could only mean that a constitutional right is subject to destruction by an arbitrary official decision, notwithstanding that a basic object of the Bill of Rights is to protect citizens from arbitrary action of that very character.

The doctrine urged by the defendants, that the mere threat of disorder is a valid constitutional ground for refusing a permit, would be appropriate only to a nation of Timid Souls. But as Mr. Justice Brandeis said of the generation that included the framers of the First Amendment:

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." *Whitney* v. *California*, 274 U. S. 357, 377 (1927).

(2.) *The constitutional doctrine for which we contend is that the public authorities have the obligation to provide police protection against threatened disorder at lawful public meetings in all reasonable circumstances.* It is, we submit, their duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so.

In no other way can the right of free assembly be made a reality. Surely it must be clear that in order to "secure" the rights of free speech and assembly against "abridgement," it is essential not to yield to threats of disorder.[7] Otherwise these rights of the people to meet and of speakers to address the citizens so gathered, could not merely be "abridged" but could be destroyed by the action of a small

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[7] The word "secure" as used in the Constitution—"to . . . secure the blessings of liberty to ourselves and our posterity"—means "make safe" rather than "acquire" or "obtain." That this was the contemporary meaning of "secure" is well illustrated by the following sentence of Franklin: "To acquire those [virtues] that are wanting, and secure what we acquire, as well as those we have naturally, is the subject of an art." Pamphlet, "Benjamin Franklin on the Art of Virtue" (The Franklin Institute, Philadelphia, 1938).

minority of persons hostile to the speakers or to the views they would be likely to express.

The doctrine invoked by the Jersey City officials seems to be the opposite of that just stated. In essence, it is that if the city authorities do not approve the speakers or the purpose of the meeting, and if some of the community object and threaten disorder, these circumstances alone justify the suppression of the meeting. It is apparent that this doctrine, if upheld, would place the rights of free speech and assembly in open-air meetings at the mercy of any faction even though a small one. But in the view for which we contend, it is immaterial whether the faction or opposition is small or great. We submit that it is the duty of the officials to prevent or suppress the threatened disorder with a firm hand instead of timidly yielding to threats.

It happens to be asserted in this case that the threatened disorder was fomented by the city authorities themselves in collusion with those who proposed to attack the meetings. The Circuit Court was impressed by the evidence supporting this assertion. (IV R. 105, 115.) If true, the assertion is interesting but is not essential to the rightness of the decree. The doctrine for which we contend will apply although the threatened disorder is spontaneous. It would merely apply, *a fortiori,* if it should appear that there was collusion between the city authorities and those threatening disorder whereby the threat was stimulated in order to use it as an excuse for denying the permit.

The more one considers the consequences that would follow from the upholding of Jersey City's position in this case, the more one is struck with the effects it would have in impairing constitutional liberty.

"The right of the people peaceably to assemble" cannot mean that the right ceases unless everybody present, including opponents of the speakers, is certain to be peaceable. Law-abiding speakers and their supporters should not be deprived of the great American institution of assemblage in the open air because other persons are intolerant and ready to violate the law against assault and battery. Such a doctrine would mean that a citizen loses his constitutional rights because his opponent threatens to commit crimes.

Surely a speaker ought not to be suppressed because his opponents propose to use violence. It is they who should suffer for their lawlessness, not he. Let the threateners be arrested for assault, or at least put under bonds to keep the peace.

If a permit can constitutionally be refused on the grounds relied upon by the defendants, a small number of lawless men by passing the word around that they intend to start a riot could prevent any kind of meeting, not only of radicals or Socialists or trade unionists, but also of Negroes, of Jews, of Catholics, of Protestants, of supporters of German refugees, of Republicans in a Democratic community or *vice versa.* Indeed, on any such theory, a gathering which expressed the sentiment of a majority of law-abiding citizens would be forbidden merely because a small gang of hoodlums threatened to break up the meeting. The only proper remedy for such situations, small or serious, is the police protection to which citizens are entitled in public places, whether they are there singly or in groups.

In recently denying a mandamus to compel the issuance of a speaking permit in Jersey City to Norman Thomas, the New Jersey court spoke of the public's "right to tran-

quillity" as if this were the only consideration. *Thomas v. Casey*, 1 A. (2d) 866 (1938). But the assertion of the predominance of a "right to tranquillity" over the right of free discussion represents the basic error of the New Jersey decision and of the defendants' contentions here. It amounts to saying that a man can be denied freedom because of the intolerance of his opponent. The *reductio ad absurdum* of the defendants' contention occurred 100 years ago in New England when an eccentric old man was imprisoned because he persisted in wearing such a long beard that the people kept mobbing him. The authorities maintained "order" by putting him in jail. See Sears, *Bronson Alcott's Fruitlands*, c. IV (1915).

(3.) *The question of the constitutionality of the ordinance on its face.* Although the decision of the Circuit Court to the effect that the ordinance is unconstitutional on its face was not perhaps essential to the decision, this Court may deem the question important as bearing upon the validity of many other ordinances of like general purpose. Many cities have ordinances requiring permits for meetings in streets and parks. Few, if any, of these may contain language like that of the Jersey City ordinance with reference to the refusal of permits to prevent riots and disorders. However, this omission might make numerous ordinances conceivably more drastic than that of Jersey City in that they might be interpreted as purporting to give the licensing authority a virtually unlimited discretion to refuse permits for any reason. In view of the doubts raised on this score by the Circuit Court, we hope that this Court will find it advisable to deal with the question in order to inform cities as to what sort of ordinances are valid. Accordingly, we submit the following observations on this phase of the case.

The ordinance, after requiring that an application for a permit for a meeting in the public streets and parks shall be made to the Director of Public Safety on three days' notice, continues:

> "3. The Director of Public Safety is hereby authorized to refuse to issue said permit when, after investigation of all of the facts and circumstances pertinent to said application, he believes it to be proper to refuse the issuance thereof; provided, however, that said permit shall only be refused for the purpose of preventing riots, disturbances or disorderly assemblage."

The essential ground upon which the Circuit Court of Appeals held this ordinance void on its face appears to have been that the ordinance by its very terms contains an unconstitutional standard for the guidance of the licensing officer. The Circuit Court did not deny that an ordinance merely requiring an application to be made to a city official for a permit, or giving the official a reasonable discretion as to the time or place of the meeting in order to allow for traffic or recreational conditions, would have been valid (Opinion of Circuit Court of Appeals, IV R. 115-116).

The Circuit Court, however, evidently considered that an ordinance which by its terms contemplates the refusal of a permit merely because, in the opinion of the licensing official, disorder is probable, without regard to a city's ability to prevent or suppress the disorder, is void *per se*.

We suggest that the view to be taken of this question of the constitutionality of the ordinance on its face, may depend upon the construction given to it. The ordinance may be held to mean (as the Circuit Court apparently assumed it must be interpreted) that the Director of Public

Safety may properly refuse a license merely because he is apprehensive of disorder, *without regard to whether such disorder can be prevented or suppressed by proper police protection.* To illustrate, the ordinance might be construed as if it read as follows:

> 3. The Director of Public Safety is hereby authorized to refuse to issue said permit when, after investigation of all the facts and circumstances pertinent to said application, *he believes that the proposed meeting would tend to cause* riots, disturbances or disorderly assemblage.

We agree that upon such a construction the ordinance is void on its face. Endorsement of such a test would mean that the licensing official on merely receiving such a notice, and believing that it had foundation, could justifiably refuse the permit, without even inquiring as to the practicability of invoking sufficient police protection to meet the threat. In practice this would mean that whether or not a particular meeting should be held would be determined by the fiat of any group that did not desire to have the meeting held and was willing to threaten disorder in order to prevent it,—at least whenever the licensing official was impressed by the threat. To uphold the ordinance, so construed, would, it seems plain, be a negation of free speech and assembly.

There are, however, other possible constructions of the ordinance. For example, it might possibly be interpreted to mean that a permit shall be refused only where after investigation and inquiry the licensing official reasonably believes that refusal of the permit is the *only* method of preventing disorder *of so serious a nature as to be beyond*

control. To illustrate, the ordinance construed in this sense might have been expressed as follows:

> 3. The Director of Public Safety is hereby authorized to refuse to issue said permit *for the time being* when, after investigation of all the facts and circumstances pertinent to said application, he reasonably believes *on the basis of substantial evidence,* that such refusal is *necessary* for the purpose of preventing riots, disturbances or disorderly assemblage *of so serious a character as to be beyond control.*

Supporting such a possible construction is the principle that an enactment will, if possible, be construed so as to avoid conflict with a constitutional provision. *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932), and cases there cited; *Wright* v. *Vinton Branch,* 300 U. S. 440, 461 (1937).

We recognize that it would be going a long way to read into the ordinance such qualifications as are set forth in the foregoing illustration. Moreover, even under such a construction it would still be open to question whether the ordinance would be constitutional on its face. The argument for its constitutionality would be that it is reasonable to allow denial of a permit as a necessary means of preventing rioting so serious as to be uncontrollable, having in mind that (except in case of outright insurrection) such denial would amount only to a postponement pending arrival of the militia or other forces necessary to protect the meeting. The contrary argument would be that, even when so construed, the ordinance would empower an administrative official to impose a previous restraint upon a meeting merely in anticipation of an uncontrollable riot that in fact might not occur. In support of such a contention, it can be argued that the instances in

which the police force of a city, properly warned and organized, would be unable to suppress any attempted disorder at a public meeting would be so rare as to furnish no justification for arming any official with power to pass judgment *in advance* to the effect that the police force of the city would be unable to cope with the situation.

IV.

A city cannot constitutionally close both its streets and its parks to public meetings. In view of the importance of open air meetings as a means for public discussion, some provision must be made for such meetings at reasonable times and places.

(1) Analysis of the decree of the District Court in respect of public meetings, and of its modification by the Circuit Court of Appeals.

It is important to analyze the precise effect of the District Court's decree with reference to meetings in streets and parks, and the effect of the enlargement of the decree by the Circuit Court. The District Court decreed in substance that so long as a city pursues the policy of permitting *some* street meetings, it must apply such policy without discrimination. On the other hand, the effect of the decree, by implication at least, was that there is no constitutional objection to a *total* closing of all the streets of a city to all meetings. See Decree, paragraph B, 4 (d). (IV R. 139.)

With reference to parks dedicated to general public uses, however, the decree of the District Court provided in substance that the city *must* open them for all public meetings at reasonable times and places and must pro-

vide proper police protection to prevent disturbances. See Decree, paragraph B, 4 (a), (b). (IV R. 138.)

The Circuit Court did not disturb the decree in so far as it deals with the parks. But by removing certain qualifying language from Paragraph B, 4 (d), the Circuit Court broadened it so as in effect to forbid the total closing of the streets to public meetings, instead of merely forbidding discrimination against the plaintiffs in the issuance of permits to meet there. In other words, the Circuit Court held in effect that the District Court should have dealt with the problem of streets in substantially the same way as the problem of parks.[8]

(2) The importance of outdoor meetings as a medium of public discussion.

We desire to stress the importance of open-air meetings as a means for public discussion and education. Outdoor public assemblies have a special function in the field of free expression that is fulfilled by no other medium. It is true that the press continues as a major vehicle of public discussion and that the new medium of the radio occupies a large part of the field. Yet it is also true that the open-air meeting still fills a major role, and is indispensable in giving free public debate its traditional scope. For this there are a number of reasons.

The outdoor meeting is especially well adapted to the promotion of unpopular causes, since such causes are likely to command little financial support and therefore must

[8] Although plaintiffs took no cross-appeal from the decision of the trial court, and therefore did not urge that the decree be modified, the Circuit Court of Appeals plainly had power to make a modification on its own motion in plaintiff's favor. See *Langnes v. Green*, 282 U. S. 531, 536-538 (1931).

often be promoted by persons who do not have the financial means to "hire a hall" or purchase time on the radio.

Moreover, the outdoor public meeting forms part of the tradition of American life. The Lincoln-Douglas debates were held in the open and notwithstanding the development of the radio, it still remains true that a large part of our political, economic and social discussion goes on in outdoor meetings. Such meetings in public places are free not only to the speakers but to their audiences. Especially in summer, it is easier in many communities to attract an audience at an open-air meeting than in any other way. Outdoor meetings can be held in convenient neighborhoods so that long journeys to meeting halls are not required. It is worthy of note also that, offsetting the competition of the radio, other modern devices have widened the scope of the open-air meeting. The amplifier of the human voice enables a speaker to address several times as many people as a generation ago; and the development of the sound-truck has also been of importance. Nothing, therefore, could be more fallacious than to assume that the open-air meeting is now, or at any foreseeable time will be, outmoded as a major medium for public discussion and the formation of public opinion in the United States.

The informal character of the outdoor meeting is often of advantage in developing questions and answers—one of the best ways of forming public opinion. For this and the other reasons just mentioned it may fairly be said that the outdoor meeting is the most *democratic* forum of public expression.

We stress these considerations because no less an issue is here involved than the constitutional power of a city to suppress, as a practical matter, substantially all outdoor

public discussion within its limits. It is because such a policy would cut off one of the most vital and important means of public discussion that it would clearly "abridge" the rights of free speech and assembly guaranteed by the Constitution.

(3) Discussion of a city's duty to provide sites for open-air meetings.

a. *The underlying problem.* It is important to recognize that *as a practical matter* a city has a virtual monopoly of every open space at which a considerable outdoor meeting can be held. At least it has a practical monopoly of all such places that are available for public use and that would not need to be hired, because vacant private land in cities has become scarce and expensive. If, therefore, it should be held that a city can constitutionally close *both* its streets and its parks entirely to public meetings (so that every foot of every public street and of every public park, irrespective of conditions and suitability, would be made forbidden ground), the practical result would be to make virtually impossible any open-air meetings in any large city. The effect would be to cut off a means of public discussion and education that, as above stated, has been of vast consequence to the American people. Such a result would, it seems to us, amount to an unconsitutional abridgement of the rights of free speech and assembly. It follows, we contend, that a city *must* make some reasonable provision for the holding of outdoor public meetings.

The question then arises as to the ways and means whereby the basic objective of protecting the right of public assembly in cities can be achieved. The decree, as expanded by the Circuit Court, does this by forbidding the

total closing of *either* the streets or the parks to public meetings, subject only to the reasonable requirements of traffic in the one case and of recreation in the other.

We regard it as rather unfortunate that the lower courts apparently considered the parks and streets as involving separate problems, to be dealt with by separate injunctive commands independent of one another. In our view, a more statesmanlike and workable approach would be to regard the availability of streets and parks as but two parts of a single problem *which should be handled as a unit.* This problem is that of reconciling the city's function of providing for the exigencies of traffic in its streets and for the recreation of the public in its parks, with its other basic obligation to provide adequate places for public discussion in order to safeguard the guaranteed right of public assembly.

Approached from this broad standpoint, the problem could be met in a variety of ways, depending upon the particular conditions in a particular city at a particular time. Thus, it would seem that if a city adopted the policy of providing an adequate number of adequate places similar to Hyde Park in London, to be used exclusively for outdoor meetings, it might constitutionally close both its streets and ordinary parks to such meetings if, in the judgment of the city authorities, the requirements of traffic and recreation made this advisable. It is true that under usual conditions in an average large city it is perfectly feasible to find some suitable places for meetings even in streets; yet it is conceivable that under extraordinary conditions, the necessities of traffic would make all the streets unsuitable, at least temporarily. In another city it might be the parks that were unsuitable under certain conditions and at particular times,

while in that city proper places for meetings could readily be provided in squares or wide streets. It may well develop that the most feasible solution of this problem in many cities will be the establishment of "Hyde Parks" of sufficient number and so located as to provide effectively for free outdoor public discussion.

With these considerations in mind, we suggest that the sound constitutional doctrine which should control this problem is that a city *must* in *some* adequate manner provide places on its property for public meetings—as distinguished from a more rigid doctrine that would *compel* both its streets and its ordinary parks to be made available. Under such a doctrine, the basic constitutional requirement of protecting freedom of assembly would be fulfilled, but without imposing rigid specific requirements as to either streets or parks that might in practice prove difficult or unworkable.

Thus, while we stress the vital importance of upholding the principle that a city must safeguard the right of assembly in open-air meetings, we also suggest that *in respect of ways and means* to that end, the rule should be reasonably flexible.

b. *Form of the decree.* Of both the District Court's decree and the enlarged decree, it may be said that they fully recognize the underlying principle that some adequate places for public meetings must be provided. The Circuit Court merely went a step beyond the trial court in defining the measure of the provision that should be made to make good the constitutional guaranty of free assembly.

We have indicated the view that the situation might have been better met by a decree more broadly and flexibly

framed. But we are concerned with the fundamental proposition that the constitutional right to hold public meetings should be vindicated and safeguarded; and the essential point is that whatever decree is made should be fully sufficient to insure adequate facilities for outdoor meetings and sufficient to prevent the sort of arbitrary discrimination which this record discloses.

(4) Davis v. Massachusetts, 167 U. S. 43, relied upon by defendants, is distinguishable in respect of its facts and the issue involved. Moreover, its rationale is incompatible with more recent decisions of this Court. A city does not control its parks like a private owner of property, but holds them for public purposes including public meetings.

It is true that forty-two years ago (long before the above mentioned *Gitlow* and other cases had brought the guarantees of the First Amendment within the purview of the Fourteenth), the Supreme Court made a decision on the subject of speaking in parks without a permit, which the defendants claim is favorable to their contention in the case at bar. *Davis* v. *Massachusetts, supra.*

In that case a Boston ordinance forbade speaking on the Common without a permit. Davis considered that the city had no right to require permits for religious services on the Common, which had formerly been unrestricted. Accordingly he proceeded to preach without asking for a permit. His conviction for violating the ordinance was upheld by the highest court of Massachusetts in *Commonwealth* v. *Davis,* 162 Mass. 510, 39 N. E. 113 (1895). Mr. Justice Holmes, then on the Massachusetts court, wrote the opinion. Davis carried the case to the Supreme Court of the United States where the conviction was sustained. We believe, however, (1) that this case is distinguishable in

respect of the issue involved, and (2) that the rationale of the case is opposed to the doctrine of later decisions of this Court.

(1) The facts in the *Davis* case were quite different from those in the case at bar. Davis spoke without a permit and without applying for one, thus completely disregarding the Boston ordinance. The present plaintiffs have, however, not disobeyed the Jersey City ordinance. They sought a permit in accordance with its terms, and it was only when that permit was refused that they took legal proceedings to modify the manner in which the city officials were administering the ordinance. Therefore, although the *Davis* case might have been cited in support of the punishment of the present plaintiffs if they had spoken without a permit, that case did not deal with the question whether an applicant for permission to speak was rightfully denied a permit, which is the issue before this Court.

Furthermore, the *Davis* case did not involve any contention that the *administration* of the ordinance was discriminatory or otherwise unconstitutional. In the case at bar, the record shows discriminatory administration of the ordinance through the refusal of permits to persons who represent unpopular causes, while permits were in the same period granted to others. It shows also that the Director of Public Safety denied permits on a premise inconsistent with preservation of the rights of free speech and assembly, viz., that a threat of disorder justified such denial without reference to the controllability of the threatened disorder.

The reasonableness of a requirement that a permit be applied for where the ordinance is not void on its face was

recognized in *Smith* v. *Cahoon*, 283 U. S. 553 (1931), and in *Lovell* v. *Griffin* (at p. 452), *supra*. That requirement was not complied with by Davis. But in this case the permits were duly applied for; and there is a question here as to the unconstitutional *administration* of the ordinance by reason of the arbitrary and discriminatory conduct of the defendant officials. This is a feature which was in no way involved in the *Davis* case.

Finally, the *Davis* case was decided long before this Court had declared the modern doctrine of protection of liberty of speech and assembly against state and municipal restrictions. In the opinion in the *Davis* case it will be observed that there is virtually no discussion of such liberties. Davis asserted that he had some kind of property in the Common, of which the ordinance deprived him, and Mr. Justice White easily disposed of this claim. Since the state of the authorities in 1897 gave very little indication that freedom of speech and assembly were protected at all by the Fourteenth Amendment, what the Court said in the *Davis* case needs to be critically re-examined in the light of such modern decisions as *Lovell* v. *Griffin* and *De Jonge* v. *Oregon* (*supra*). See Section II of this Brief.

(2) Although the result of the outmoded *Davis* case is distinguishable, the defendants may rely on some of its language as favorable to their contention in the case at bar. Thus Mr. Justice Holmes said (162 Mass. at p. 511, 39 N. E. at p. 113):

> "For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary rights

> interfere, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes."

Mr. Justice White, besides quoting Mr. Justice Holmes as above, also said (167 U. S. at p. 48):

> "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."[9]

Thus, Mr. Justice White's reasoning was in substance: (a) The city has title to the Common; (b) title to property involves the right to exclude all persons from it, there being no difference in this respect between public and private property; and (c) the "greater" power to exclude all persons unconditionally and in *all* circumstances, implies the "lesser" power to exclude in *any* circumstances.

Passing for the moment the first two steps, we submit that the third—the so-called doctrine of "greater and lesser powers"—has been repudiated in a number of more recent decisions of this Court from 1898 down to December, 1938.

Beginning with *Blake* v. *McClung*, 172 U. S. 239 (1898), the Court has developed the doctrine of so-called unconstitutional conditions, which, as the dissent of Mr. Justice

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[9] Judge Bodine makes the same argument in the above mentioned New Jersey suit brought by Norman Thomas against the present defendants. *Thomas* v. *Casey*, 1 A. (2d) 866, 870 (1938). In his opinion Judge Bodine said:

> "He (Thomas) has no more right to speak in public places in that city, such as highways and parks, without permit than he has to invade a citizen's home without invitation."

Holmes pointed out in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 54 (1910), is logically incompatible with the doctrine of "greater and lesser powers." Thus although a state has the "greater" power to exclude from intrastate business all companies incorporated elsewhere, it does not possess the "lesser" power of admitting them on condition that they pay an otherwise unconstitutional tax, *Western Union Telegraph Co.* v. *Kansas, supra*, or agree to abstain from resort to the federal courts. *Terral* v. *Burke Construction Co.*, 257 U. S. 529 (1922).

The Court has not hesitated to hold unconstitutional even conditions placed by the State on the use of its own property. Thus, *Frost Trucking Co.* v. *Railroad Commission of California*, 271 U. S. 583 (1926), held invalid a state statute which required all public carriers to obtain certificates of convenience and necessity as a condition of using the public roads. Even more striking is *Missouri ex rel. Gaines* v. *Canada*, 59 Sup. Ct. 232, decided December 12, 1938, the most recent case in which the Court has declined to apply the doctrine of greater and lesser powers. The question there was whether a state may furnish law school facilities in a state university to white students while denying them to colored students. As the dissent said:

> "Under the opinion just announced, I presume she [the State of Missouri] may abandon her law school * * *."

And as the Chief Justice, speaking for the majority, stated:

> "The question here is not of a duty of the State to supply legal training; * * * but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right."

The Court held that, although the State and the State University which is its agency have the power to refuse to devote public property to use as a law school, they do not have the "lesser" power to allow it to be used by white law students only.

It is submitted, therefore, that the third step of Mr. Justice White's reasoning in the *Davis* case is no longer law in view of the authorities just cited. Therefore that decision offers no comfort to the defendants, so far as the finding of discriminatory administration is concerned.

In so far as the *Davis* case bears on the other issue of unconstitutional administration, viz., the denial of permits because of a mere threat of disorder without reference to controllability, its reasoning is likewise believed to be unsound. For in addition to the erroneous assumption that a greater power necessarily includes a lesser one, another essential error inheres in the second step of Mr. Justice White's reasoning, viz., in the assumption that a city "owns" its parks in the same sense and with the same rights as a private owner owns his real estate.

Despite the eminence of the judges who have used this argument, we submit that it is not a correct conception of the relation of a city to its parks in respect to their availability for public meetings. It is untenable to assert that a city "owns" its parks in the same way that a man owns his house, with the right to exclude or admit anyone he pleases. The parks are held for the public. A man's house is primarily for himself and his family, and if he chooses to admit strangers, that is his incidental right. But the primary purpose of a park is to provide generally for the use and recreation of the people. An essential difference between a city and the private owner is that the latter can

admit some outsiders and exclude others on any whimsical basis he wishes. But surely a city has no such right in respect of the parks. A city may regulate reasonably in this respect but may not arbitrarily discriminate. This does not mean that the city is unable to make any choices. Thus it can keep adults out of children's playgrounds. But it cannot keep out red headed children while admitting youthful blondes and brunettes, nor can it limit the park benches to members of one political party.

Accordingly, though it is doubtless true that a city can regulate its property in order to serve its public purposes, there is, we submit, a constitutional difference between reasonable regulation and arbitrary exclusion. In short, the right of a city in respect of its parks resembles other governmental rights in that it must be administered for the benefit of the public and not in an arbitrary manner. There are many different kinds of public benefits to be derived from parks, and one of the most important is the constitutional right of assembly therein. The parks are held by the city subject to this right. It can be regulated in a reasonable manner; it must not be denied. To the extent that the rationale of *Davis* v. *Massachusetts* is inconsistent with this doctrine, we submit that it is no longer good law.

The danger of the private ownership theory of public property, represented by *Davis* v. *Massachusetts*, becomes particularly impressive at a time like the present when acquisitions of large amounts of property are being made by government and it is carrying on enormous activities, such as those conducted by the Tennessee Valley Authority. If these properties can be administered with the arbitrary power to exclude anybody who happens to be disliked by officials or politically influential groups, then those who

oppose the governmental policies of the moment would find many aspects of their lives at the mercy of a property owner (nation, state or city), possessed of vast and arbitrary power. They could be shut out at the will of the executive or the legislature, not only from parks or libraries or museums, but from mailing or receiving letters; from purchasing electric current or water power or goods manufactured in government plants; from riding on municipal trolley cars or buses; from selling their products to the government or from doing work for it in fields where there might no longer be any other customer worth mentioning. A private owner can ordinarily admit whom he pleases, sell to whom he pleases, buy from whom he pleases. But surely, the Constitution does not confer upon government a similar uncontrolled choice.

The true analogy to government ownership of parks and other property dedicated to public uses is furnished by a public utility, which must give service to all so long as this is consistent with the performance of its functions. It can regulate, but not discriminate. It can refuse to deal with those who interfere with its functions or with other users of its service, or when the available services are exhausted. We already recognize this principle as applied to governmental substitutes for private utilities. Thus a municipal street railway can eject "drunks" and set a limit on overcrowding, but nobody contends that it can refuse to transport members of unpopular groups even if other passengers express a dislike for them.

In the same way, the parks can be regulated in a manner consistent with their purposes, one of the most important of which is the right of free assembly therein for public discussion at reasonable times and places. Disorderly per-

sons can be excluded, because they interfere with peaceable users of the parks like drunks in the municipal trolley car. Open-air meetings can be assigned to a particular park or a particular area, just as passengers can be assigned to particular seats or told to move away from the door. If all the available space is occupied and there is no more room for meetings, permits can stop, just as a full municipal street car can refuse to take on passengers. But we submit that law-abiding Democrats or Republicans or Communists or unionists or members of the American Civil Liberties Union can no more be constitutionally kept out of empty park spaces reasonably suitable for open-air meetings than they can be excluded from an empty municipal trolley car, or be refused current from a municipal power plant.

In sum, a city is required to furnish its municipal services to all, subject only to reasonable rules. Surely this principle is no less applicable when those services include the making available of space for open-air meetings, in pursuance of the right of assembly that is guaranteed by the Constitution of the United States.

The basis of the right of assembly is the substitution of the expression of opinion and belief by talk rather than force; and this means talk for all and by all.

Summary and Conclusion.

We have undertaken to show that the course of conduct of the defendant officials of Jersey City that is forbidden for the future by the decree, is violative of one of the most valuable and necessary American rights—the right of free discussion in open-air meetings held for lawful purposes.

The findings of fact show a deliberate policy of the Jersey City officials to discriminate against the C. I. O. and the American Civil Liberties Union and in one way or another to prevent the public expression of their ideas in Jersey City.

This suppression is sought to be justified under the plea of the maintenance of public order. But we have shown that the excuse is specious; that if allowed it would place precious rights of free speech and assembly at the mercy of any reckless faction; and that, as the decree provides, such threats of disorder as appear here must be met by providing police protection, to the end that the constitutional rights of Americans shall not be sacrificed to intimidation.

The suppression is also sought to be justified by invoking a decision of Mr. Justice White over forty years ago. *Davis* v. *Massachusetts, supra.* But we have shown that the case is different from the one at bar and further that the alleged implications of the decision are completely out of harmony with the whole modern trend of decision in the Supreme Court that has given a wide scope to the rights of free speech and assembly and set up strong safeguards against their impairment.

In conclusion, we wish to stress the denial of the right of assembly that is forbidden by the decree as *essentially a manifestation of intolerance.* Nothing can be clearer than that it was solely because the views of the C. I. O. and Civil Liberties Union and of their speakers were unacceptable to the authorities of Jersey City, that they took their drastic steps to deny to the plaintiffs the right to conduct the public meetings which they sought to hold.

It is because of the striking example of ruthless intolerance afforded by this case that it is so significant for the future of American civil rights. For tolerance is of the essence of the American system and of the American way of life—not only tolerance in matters of religion, but also tolerance in matters of political, economic and social belief; tolerance not only of views that we can approve, but also (as Mr. Justice Holmes said) of views that we hate; tolerance not only of views that accord with our interests but also of views that are inimical to our interests.

In the long run, a system of government and a way of life resting, as does ours, on the consent of the majority can survive only if we support tolerance and free discussion within wide limits. The law alone cannot instill that degree of tolerance upon which our institutions rest. Only education and a widespread understanding of the essentials of free government can do that. But the courts can, in concrete cases, aid in preserving free institutions by forbidding definite acts that suppress lawful free expression.

The present case is of that character. The plaintiffs were doing nothing more than to invoke their American constitutional right "peaceably to assemble." The findings of fact show a deliberate effort to suppress the exercise of that right. The grounds upon which the suppression is sought to be justified are specious and insufficient.

The Committee submits that the case calls for a decree that will enjoin the continuance of the arbitrary acts of the

defendants and afford full and effective protection to the constitutional right of assembly.

Respectfully submitted,

THE COMMITTEE ON THE BILL OF RIGHTS, OF THE AMERICAN BAR ASSOCIATION

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